IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.900 OF 1992.

Smt.Radhabai Govind Kshirsagar
and another : Appellants.

versus

Dr.Bhalchandra Govind Kshirsagar
and others. : Respondents.

ALONG WITH

FIRST APPEAL NO.758 OF 1999.

Sharad Govind Kshirsagar
and another : Appellants.

versus

Dr.Bhalchandra Govind Kshirsagar
and others. : Respondents.

ALONG WITH

CROSS OBJECTION NO.6691 OF 1999

Smt.Radhabai w/o Govind Kshirsagar
and another : Appellants.

versus

Dr.Bhalchandra Govind Kshirsagar

and others. : Respondents.

Mr.P.B.Shah for the appellants.
Mr.Sanjay Kshirsagar for the respondents.

CORAM : D.G.DESHPANDE,J.

DATED : 28th APRIL 2005.

OR AL JUDGMENT

1. Heard advocates for the appellants and the respondents. Both these appeals have been filed by the original defendants and, the cross objection is filed by the original plaintiff.

2. Appeal No. 900 of 1992 was filed against preliminary decree and Appeal No. 758 of 1999 was filed against the final decree. The suit was filed for partition by the respondent No.1, who is common in both the Appeals. He had a 2/3rd share in the property because of his contribution in the construction of the building which was part and parcel of the suit property. The trial court decreed the suit of the plaintiff to the extent of 1/3rd share in the property as described in the schedule and also consequently

decreed the claim for partition and separate possession of 1/3rd share by metes and bounds.

3. The claim of the plaintiff in the trial court about his 2/3rd right in the property was opposed by the present appellants/the original defendants on two counts. Since the plaintiff was claiming the major share in the property on the basis of his contribution in the construction and since the plaintiff had filed an earlier suit No. 73 of 1975 before Civil Judge, Senior Division, Pune for recovery of the said amount and since ultimately claim of the plaintiff made in the suit came to be dismissed by the Appellate Court in Appeal No. 987 of 1983 and the plaintiff's Second Appeal was also came to be dismissed vide Second Appeal No. 92 of 1988 by judgment and decree dated 21.3.1988, the plaintiff could not claim 2/3rd share in the property.

4. According to the defendants/ appellants Govind - the father was the absolute owner of the property. It was his self acquired property and, by virtue of a Will executed by Govind in favour of the present appellants, the claim of the

plaintiff was liable to be rejected because in the said Will the entire property was given to the present appellants.

5. The trial court, however, after considering the evidence of the parties, came to the conclusion that though the father Govind was originally the owner of the property by virtue of the agreement between the parties, copy of which is filed in the record at Exhibit 77, the suit property came to be treated and accepted as joint family property and therefore the Will of the father covering the entire suit property was not a legal and valid disposition of the property and the plaintiff - respondent had 1/3rd share in the property. It is this order and reasoning that is challenged in both these Appeals.

6. Counsel for the appellant repeatedly and strenuously urged that once the court has given a finding against the plaintiff and the suit filed by the plaintiff for recovering the said amount of contribution has ultimately been dismissed then the claim of the plaintiff in the present suit on the basis of the said contribution should not have been allowed and considered. She also

urged that if the father was the absolute owner of the property on the date of the Will, then disposition of the property by the father as per the Will could not be challenged and the Court committed an error in awarding to the plaintiff 1/3rd share in the suit property.

7. It is true that the claim of the original plaintiff, as made out in Suit No. 73 of 1975, filed by him, came to be ultimately dismissed. It is also true that in Exhibit 77 which was an agreement between the parties i.e. the father and the original plaintiff and the present appellants there is a mention of the plaintiff's contribution of Rs.15,000/-. However, the contention of the counsel for the appellants that since that claim of the plaintiff about contribution is rejected, the plaintiff is not entitled to any share, cannot be accepted because there is a clause No.8 in the said agreement Exhibit 77, which is as under:

> **"The amount given by person No.3 (i.e. Plaintiff) amongst us for the construction shall have a preferential right over this property. As and when**

required, person No.3 amongst us can utilize the ground floor of this society for himself. Person No.3 amongst us can construct by his own expense and reside there over the next immediate floor. So also person no.4 (i.e. appellant) amongst us as and when required can construct the next floor, i.e. third floor by his own expenses."

8. Respondent/original Plaintiff Dr.Bhalchandra Kshirsagar filed a suit vide Special Civil Suit No.835 of 1989 before the Joint Civil Judge, Senior Division, Pune for partition and separate possession of the suit property. He was claiming 2/3rd share in the suit property. The trial Court found that he is entitled to 1/3rd share only and, therefore, the suit was decreed to that extent.

9. It is an undisputed fact that after the 1st appeal i.e. Appeal No.900/92 was filed, certain direction was given to the appellants/original defendants to give security. That was not complied with. Therefore, the original plaintiff moved for execution of decree

dated 29th February 1992. The decree was accordingly executed. The plaintiff was placed in possession of 1/3rd share and preliminary decree came to be converted into final decree. Therefore, the defendants filed 2nd appeal i.e. Appeal No.758 of 99. In the 1st appeal there is a cross objection of the original plaintiff.

10. I had initially heard Advocate Smt.Suhasini Mutalik for the appellants in this matter on 7th March 2005. I had started dictating the judgment. About 7 paras were dictated at that time Smt.Mutalik prayed for an adjournment and further time. Time was granted and, thereafter today advocate Mr.Shah for the appellants/original defendants made his submissions. Advocate Mr.Kshirsagar also made his submission on behalf of the respondents/original plaintiffs.

11. Mr.Shah made following submissions. Firstly according to him, the suit for partition was the 2nd suit of the plaintiff. He was claiming that the suit property was joint property on the basis of family arrangement and agreement of 5th July 1971. Mr.Shah, therefore,

pointed out that the amounts that have been mentioned in the said agreement as payment by the plaintiff to deceased Govind Kshirsagar was the subject matter of the suit filed by the plaintiff earlier in 1975. [That suit will be referred, hereinafter, to as the "1st suit"]. And that suit was partly decreed by the trial Court. When the decree was challenged, the trial Court allowed the appeal and dismissed the suit. Therefore, according to Mr.Shah, when the family arrangement was already in existence at the time of 1st suit and when the 1st suit was based upon the family arrangement then 2nd suit cannot lie.

12. Mr.Shah also urged that in the 1st suit the plaintiff had given admission that the suit property was self-acquired property of his father and if that is so, he cannot be now permitted to contend that this suit property was family property or joint family property. Secondly, Mr.Shah contended that if at the time of filing of 1st suit the family arrangement or agreement is in existence and the suit came to be filed merely for recovering the money but not for share in the property or for declaration, then the 2nd suit was barred by the provisions of Order II

Rule 2 of the Code of Civil Procedure.

13. Mr.Shah also contended that the so called family arrangement or agreement entered into between the plaintiff and deceased Govind Kshirsagar and other brother was terminated by deceased Govind during his life time by a notice given to the plaintiff and, since that termination was not challenged by the plaintiff earlier and, since by that termination ouster of the plaintiff from the joint family was sought by deceased Govind, then the suit filed by the plaintiff, twelve years after the said notice of termination, was barred by limitation. According to Mr.Shah, all these aspects and objections of the defendants were not properly considered by the trial Court and, the court committed an error in granting or awarding 1/3rd share to the plaintiff and, therefore, the judgment of the trial Court was liable to be set aside.

14. On the other hand, counsel for the plaintiff contended that the 1st suit of the plaintiff was not on the basis of family agreement but it was on the basis of promissory notes and, therefore, the 2nd suit on the basis

of family agreement was not at all barred. He also pointed out that the 1st suit came to be dismissed ultimately by the appellate court not because the court found that the case of the plaintiff was false or bogus but on technical ground of limitation viz. not filing the suit within three years of the promissory notes and the suit getting abated. He, therefore, contended that filing of the 1st suit or its dismissal could not be barred in filing the 2nd suit. So far as admission of the plaintiff in the earlier suit is concerned, advocate Mr.Kshirsagar, appearing for the plaintiff, contended that it was no admission at all and, from the said admission, it could not infer that the plaintiff has ever agreed that the suit property was self-acquired property of the father.

15. Thirdly, the counsel for the plaintiff contended that the father was the owner of the plot only. There were documents on record to show that the father i.e. deceased Govind, who was getting pension of Rs.105/- only, had no funds at all to construct the house. The society, of which deceased Govind was the member,

was persuading, insisting and pressurising deceased Govind to construct the house at the earliest. It was the plaintiff who came to help the father in construction of house as the house has not been constructed in time, then deceased Govind could have lost the plot. He, therefore, pointed out that it was in this background that the family agreement came to be executed by deceased Govind and other brother of plaintiff Bhalchandra. That agreement was binding between the parties, because admittedly, the amount given by the plaintiff for construction is not returned so far. The counsel for the plaintiff also urged that all these aspects of the matter have been properly considered by the trial Court and no interference was called for.

16. So far as his cross objection is concerned, he contended that the plaintiff was in fact entitled to 2/3rd share and not 1/3rd share.

17. I have given my anxious consideration to the submissions made by both the advocates. A perusal of plaint in the 1st suit will show that it was a suit filed by the plaintiff on the basis of certain promissory notes. There is specific

mention to those promissory notes in that plaint i.e. Promissory Notes dated 10.10.1970; 13.12.1970; and 28.10.1973 and a cheque was given on 3.5.1973. It is true that there is a reference to the family agreement dated 5.7.1971 but the whole tenor of the plaint will show that it was a suit based on promissory notes only and, though the family agreement dated 5.7.1971 was referred to, that was for the purpose of clarification. The claim in the suit was not at all based on that family agreement.

18. My attention was also invited by Mr.Shah, appearing for the appellants/original defendants, to the prayers in the 1st suit wherein the plaintiff has prayed that the amount decreed be realised by sale of suit property to which he has referred as charged property. He, therefore, contended that in view of this prayer it can be rightly inferred that the plaintiff was not claiming any joint ownership in the property.

19. Third submission of Mr.Shah in this regard was that if the family agreement dated 5.7.1971 was in existence at the time of the suit, then the plaintiff should have claimed all

the reliefs out of that agreement and, if he has chosen not to claim any of those reliefs, then the 2nd suit was barred under Order II Rule 2 of the Code of Civil Procedure.

20. I do not find any substance in the submissions made by Mr.Shah for the appellants. The 1st suit was purely based on the promissory notes. It had nothing to do with any right of the plaintiff in the suit property. If the plaintiff had succeeded in getting back his money, then, might be, he would have lost his rights under the agreement, if at all the claim in the agreement and claim in the earlier suit is same and identical. Merely because the family arrangement or agreement was in existence at the time of institution of 1st suit, it was not obligatory upon the plaintiff to make all the claims on the basis of the said family agreement. His claim in that suit was on the basis of promissory notes given and, therefore, filing of 2nd suit on the basis of family agreement cannot be hit by the provisions of Order II Rule 2 of the Code of Civil Procedure. Similarly, making prayer for recovering of decretal amount by sale of charged property cannot also show or indicate

that the plaintiff never treated the suit property as joint family property. What is not pleaded and not claimed cannot be inferred in the manner in which Mr.Shah wants the Court to do.

21. Similarly, regarding so called admission given by the plaintiff that the suit property was self acquired property of deceased Govind, my attention was drawn by Mr.Shah to the evidence of the plaintiff in the earlier suit. In para 6 of his evidence the plaintiff has stated that, "It is my prayer to recovery my amount from the property of deceased defendant in the hands of the other defendants." According to Mr.Shah this is an admission by the plaintiff that the suit property was self acquired property of deceased Govind. It is difficult to accept this submission. Firstly, so far as 1st suit is concerned, whether the property was joint or self acquired property was not at all a fact in issue or relevant fact. The claim of the plaintiff was based on the promissory notes. When the question i.e. the fact in issue was, whether the plaintiff succeeded in proving the liability of the defendants on the basis of promissory notes and, secondly, in the prayers of 1st suit itself,

the plaintiff has claimed that he should be given decretal amount by selling the suit property. It is with reference to that prayer, that the plaintiff has made the aforesaid statement. It is not an admission by the plaintiff that the suit property was the self acquired property of deceased Govind. "The property of deceased Govind does not at all mean that it is an admission that it is self acquired property." Therefore, this so called admission of the plaintiff is of no help to the defendants in destroying the case of the plaintiff.

22. When the counsel for the plaintiff pointed out that after sale of the ancestral property, the suit plot was purchased, Mr.Shah tried to contend that the plaintiff was given his share in the sale proceeds of the ancestral property. My attention was drawn by him in this regard to the statement of the plaintiff i.e. in the cross examination of the plaintiff. It is to the following effect :-

> "Witness is shown Exh.93 it bears his signature. It is true that amount of

> Rs.2000/- received by my father through the sale of the land at Phaltan were deposited in my account"

Mr.Shah tried to contend that this statement of the plaintiff in the cross examination shows that whatever share in the family property was given to the him and, therefore, now he cannot claim anything in the suit property. It is difficult to accept this submission. What the plaintiff was admitted is that the amount of Rs.2000/- received by his father was kept in his account. Keeping the amount by the father is not an indication of giving of that amount to the plaintiff. At that time admittedly, the relationship of the plaintiff with his father was cordial and, therefore, the father had kept that amount in the account of the plaintiff out of trust and confidence, mutual love and affection. The circumstance or statement cannot be treated as paying of to the plaintiff his share in the property.

23. The next submissions of Mr.Shah was that this family agreement dated 5.7.1971 was terminated by the father during his life time.

My attention was drawn to the notice given by the father to Dr.Bhalchandra - the plaintiff. That notice at the most indicates that the father wants to terminate that agreement but merely because father writes such a letter or gives a notice it will not amount to termination of agreement. Because the fact remains that the plaintiff has, for construction of house, paid in all Rs.22,000/- plus Rs.14,000/- and the amount has not been repaid either by the deceased father or any of the defendants. It is a fact on record that had the plaintiff not given financial assistance the house could not have been constructed at all. In stead of showing gratitude towards the plaintiff for his timely financial assistance, the defendants are now trying to deny his entire claim. They are not showing their readiness and willingness to return the amount also. They are trying to take advantage of dismissal of the first suit which was dismissed not on account of inability of the plaintiff to prove his case or failure of the plaintiff to prove his case, but it is a dismissal particularly on technical legal ground. If the plaintiff has, by his financial assistance, rendered help to the family in

construction of the house and, if in the absence of plaintiff's financial assistance, the plot could have been lost to the society forever, then it was expected from the defendants to give the plaintiff his legitimate share in the property. But they are not ready and willing to give his 1/3rd share as granted by the trial Court. There is absolutely no substance in the appeals. Both the appeals are liable to be dismissed.

24. So far as cross objection is concerned, according to the plaintiff, he has 2/3rd share. I do not find any substance to grant that prayer also. Therefore, the cross objection is also dismissed. In the result, the following order:-

:ORDER:

Both the appeals and the cross objection are dismissed.

Decree of the trial Court which is now converted into final decree as per which the plaintiff has been placed in possession to remain as it is.

1/3rd share granted by the trial Court and as finally modified by this Court by an order dated 1st October 1999 in Civil Application No.6691 of 1999.

Prayer of status quo is rejected as the entire defence of the defendants is found to be bogus, false and afterthought to deprive of the plaintiff from his legitimate rights.

[D.G.DESHPANDE]

28/04/2005 JUDGE.